

REMARKS

After entry of this amendment, claims 1, 2, 4, 7, 9, 14, 15, 19, 25, 26, 28-41, 43-62, and 65-76 will be pending for the Examiner's review and consideration. Claim 59 has been amended. Claims 65-76 have been added. No new matter has been added. Claim 64 has been canceled without prejudice. Claims 3, 5, 6, 8, 10-13, 16-18, 20-24, 27, 42, and 63 were previously canceled without prejudice. Claims 30, 31, 33, 34, 37, 38, 49, 50, 52, 53, 56, and 57 have been withdrawn as being directed to a non-elected species pending allowance of a generic claim. Reconsideration and allowance of the present application in view of the above amendments and the following remarks is respectfully requested.

This amendment responds to the office action mailed September 29, 2004. In the office action the Examiner:

- rejected claims 1, 4, 9, 14, 15, 25, 26, 28, 32, 35, and 36 under 35 U.S.C. §102(b) as being anticipated by United States Patent No. 4,497,419 to Reitzel ("Reitzel");
- rejected claims 7, 19, 39, and 59-62 under 35 U.S.C. §103(a) as being unpatentable over Reitzel;
- objected to claims 2, 29, and 64 as being dependent upon a rejected base claim, but otherwise allowable if rewritten in independent form to include all of the limitations of the base claim including any intervening claims; and
- allowed claims 40, 41, 43-48, 51, 54, 55, and 58.

35 U.S.C. §102(b) and §103(a) Rejections

As an initial matter, the Applicant would like to thank the Examiner for the allowance of independent claim 40 and dependent claims 41, 42, 43-48, 51, 54, 55, and 58 which depend therefrom. It is respectfully submitted that independent claim 40 is generic, at least with respect to Figures 4b, 4c, 8, and 9 (all of which depict an end member having, *inter alia*, a first portion with a top surface, a perimeter edge and a first channel for receiving a surgical instrument; a second portion configured and dimensioned to be inserted into a bore of the intervertebral spacer body; and a shoulder joining the first and second portions and sized to rest on an end edge of the intervertebral spacer body when the second portion is inserted in

the bore of the intervertebral spacer body, wherein the second portion comprises a plurality of resilient tabs flexing inward upon insertion of the second portion in the bore of the intervertebral spacer body and flexing back outward to secure the end member to the intervertebral spacer body). Therefore, allowance of claims 49, 50, 52, 53, 56, and 57, all of which ultimately depend from independent claim 40 is respectfully requested.

Moreover, the Applicant would like to thank the Examiner for the indication of allowance of the subject matter disclosed in claims 2, 29, and 64 if rewritten in independent form. It is respectfully submitted that the Applicant has amended claim 59 to include all of the limitations of claim 64 per the Examiner's recommendation. Accordingly, it is respectfully submitted that independent claim 59 is allowable over the cited prior art. Withdrawal of this rejection and allowance of independent claim 59 is respectfully requested.

Claims 60-62 all ultimately depend from independent claim 59, and thus, it is respectfully submitted that these claims are equally allowable. Withdrawal of these rejections and allowance of claims 60-62 is therefore respectfully requested.

Furthermore, the Applicant has added independent claim 65 which includes all of the limitations of allowed claim 29 including intervening claim 28. Accordingly, it is respectfully submitted that independent claim 65 is allowable over the cited prior art. Allowance of independent claim 65 is respectfully requested.

Newly added dependent claims 66-70 all ultimately depend from independent claim 65, and thus, it is respectfully submitted that these claims are equally allowable. Allowance of claims 66-70 is therefore respectfully requested.

The Applicant has also added independent claim 71 which includes all of the limitations of allowed claim 2. Accordingly, it is respectfully submitted that independent claim 71 is allowable over the cited prior art. Allowance of independent claim 71 is respectfully requested.

Newly added dependent claims 72-76 all ultimately depend from independent claim 71, and thus, it is respectfully submitted that these claims are equally allowable. Allowance of claims 72-76 is therefore respectfully requested.

Independent claim 1 was rejected under 35 U.S.C. §102(b) as being anticipated by Reitzel. Independent claim 1 requires an end member for use with an implant for fusing bone comprising a first portion with a top surface adapted and configured to engage the bone and having a perimeter edge and a first channel extending across at least a portion of the top surface from the perimeter edge for receiving a surgical instrument; a second portion configured and dimensioned to be inserted into a bore of the implant; and a shoulder joining the first and second portions and sized to rest on an end edge of the implant when the second portion is inserted in the bore of the implant; wherein the second portion comprises a plurality of resilient tabs flexing inward upon insertion of the second portion in the implant and flexing back outward to secure the end member to the implant.

As an initial matter, Reitzel discloses a one-piece plastic closure cap for sealing an aperture, *for example*, an oil filler neck, a valve cover, etc. It is respectfully submitted that because Reitzel relates to a different field of research, Reitzel does not disclose, teach, or suggest an end member for use with an implant for fusing bone. Nor does Reitzel disclose, teach, or suggest a top surface adapted and configured to engage bone. It is respectfully submitted that functional language, *for example*, "for fusing bone" and "adapted and configured to engage bone" must be evaluated and considered, just like any other limitation of the claim, for what it fairly conveys to a person of ordinary skill in the pertinent art. See M.P.E.P. §2173.05(g). One of ordinary skill in the art would not read Reitzel to disclose, teach, or suggest an end member for fusing bone. Nor would one read Reitzel to disclose, teach, or suggest a top surface adapted and configured to engage bone. Thus, it is respectfully submitted, that Reitzel does not teach, disclose, or suggest all of the limitations of independent claim 1. Therefore, withdrawal of this rejection and allowance of independent claim 1 is respectfully submitted.

However, assuming *arguendo*, that one skilled in the art would read Reitzel to disclose an end member to fuse bone, and a top surface adapted and configured to engage bone, it is respectfully submitted that Reitzel still does not disclose, teach, or suggest all of the limitations of independent claim 1. Specifically, independent claim 1 requires, *inter alia*, a first portion with a top surface having a perimeter edge and a first channel extending across at least a portion of the top surface from the perimeter edge for receiving a surgical instrument. In contrast, Reitzel discloses a plastic closure cap 10 having a first body portion 16 with an axially outwardly facing surface 24. The surface 24 includes a plurality of axially outwardly extending gripping means 26 which includes a pair of flange members 28, 30 so

that the user can grip the cap 10 in order to rotate the cap 10 into and out of the aperture 12. There is absolutely no disclosure, teaching, or suggestion in Reitzel of a top surface having a first channel extending across at least a portion of the top surface for receiving a surgical instrument.

Furthermore, independent claim 1 requires, *inter alia*, a first portion, a second portion configured and dimensioned to be inserted into a bore of the implant; and a shoulder joining the first and second portions and sized to rest on an end edge of the implant when the second portion is inserted in the bore of the implant; wherein the second portion comprises a plurality of resilient tabs flexing inward upon insertion of the second portion in the implant and flexing back outward to secure the end member to the implant. There is no disclosure, teaching, or suggestion in Reitzel of a plurality of resilient tabs flexing inward upon insertion of the second portion in the implant and flexing back outward to secure the end member to the implant. Rather, Reitzel discloses a plastic closure cap 10 for insertion into an aperture 12. The cap 10 having a first body portion 16 and a second body portion 20 wherein the second body portion 20 is in the form of a cylindrical section which is bisected by a plurality of slots 41, 72, 76 which form first 78 and second 80 radially extending lever arms. Each lever arm 78, 80 includes a lug portion 82, 84 so that in use, the cap 10 is placed axially over the aperture 12 with the lever arms 78, 80 aligned with slots 104, 106 formed in the aperture 12. Thereafter, the closure cap 10 is moved axially toward the aperture 12 so that the lugs 82, 84 move through the slots 104, 106. Next, the lugs 82, 84 are rotated so that the lugs 82, 84 engage camming surfaces 108, 110 formed in the aperture 12. Continued rotation of the closure cap 10 causes the lugs 82, 84 to deform. Thus, it is respectfully submitted that there is absolutely no disclosure, teaching, or suggestion in Reitzel of providing a plurality of resilient tabs which flex inward upon insertion of the second portion in the implant and flex back outwards to secure the end member to the implant.

Therefore, it is respectfully submitted that Reitzel does not disclose, teach, or suggest all of the limitations of independent claim 1. Thus, withdrawal of this rejection and allowance of independent claim 1 is respectfully requested.

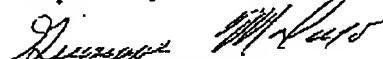
Dependent claims 2, 4, 7, 9, 14, 15, 19, 25, 26, 28, 29, 32, 35, 36, and 39 all ultimately depend from independent claim 1 and thus, it is respectfully submitted that these claims are equally allowable. Allowance of these claims is therefore respectfully requested.

Moreover, it is respectfully submitted that independent claim 1 is generic, at least with respect to Figures 4b, 4c, 8, and 9 (all of which depict an end member having, *inter alia*, a first portion with a top surface, a perimeter edge and a first channel for receiving a surgical instrument; a second portion configured and dimensioned to be inserted into a bore of the intervertebral spacer body; and a shoulder joining the first and second portions and sized to rest on an end edge of the intervertebral spacer body when the second portion is inserted in the bore of the intervertebral spacer body, wherein the second portion comprises a plurality of resilient tabs flexing inward upon insertion of the second portion in the bore of the intervertebral spacer body and flexing back outward to secure the end member to the intervertebral spacer body). Therefore, allowance of claims 30, 31, 33, 34, 37, and 38, all of which ultimately depend from independent claim 1 is also respectfully requested.

In light of the above amendments and remarks, it is respectfully submitted that claims 1, 2, 4, 7, 9, 14, 15, 19, 25, 26, 28-41, 43-62, and 65-76 are now in condition for allowance, and the Examiner is respectfully requested to reconsider this application with a view towards allowance. The Examiner is invited to call the undersigned attorney at 212-326-7883, if a telephone call could help resolve any remaining issues.

Respectfully submitted,

Date: December 29, 2004


By: Giuseppe Molaro 52,039
(Reg. No.)

35,340

For: Brian M. Rothery (Reg. No.)
JONES DAY
222 East 41st Street
New York, New York 10017
(212) 326-3939